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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT W. MAHER, Individually and as
Successor in Interest etc. et al.,

Plaintiffs and Appellants,

v.

MILESTONE FINANCIAL LLC et al.,

Defendants and Respondents.

D075088

(Super. Ct. No. RIC1601456)

APPEAL from a judgment of the Superior Court of Riverside County, John W.
Vineyard, Judge. Reversed and remanded with directions.

Law Office of Nick A. Alden and Nick A. Alden for Plaintiffs and Appellants.

Binning Ripps and Michael W. Binning for Defendants and Respondents

Milestone Financial, LLC and Mortgage Lender Services, Inc.

Law Offices of Elkanah J. Burns, Elkanah J. Burns; Harris L. Cohen for
Defendant and Respondent DLI Properties, LLC.

In this wrongful foreclosure action, the plaintiffs (Plaintiffs) asserted six causes of action against three defendants—the lender, the trustee under the foreclosed deed of trust, and the purchaser of the property at the foreclosure sale (together Defendants). The trial court sustained with leave to amend the purchaser's demurrer to the only two causes of action in which that defendant was named. Plaintiffs failed to amend timely, and following the purchaser's ex parte application to dismiss the action as to the purchaser (only), the court ordered that the entire action be dismissed with prejudice as to all Defendants.

The court later denied Plaintiffs' ex parte application to vacate the dismissal under Code of Civil Procedure section 473, subdivision (b) (§ 473(b); further unidentified statutory references are to this code) and eventually entered a judgment of dismissal in favor of all Defendants.

As we explain, the trial court erred in dismissing the action as to the lender and the trustee, since neither was involved in the purchaser's demurrer or the purchaser's request to dismiss the action. As we further explain, the trial court also erred in denying Plaintiffs' ex parte application to vacate the dismissal as to the purchaser, since the evidence in Plaintiffs' attorney's declaration of fault—which was the only evidence before the court—fully complied with section 473(b)'s mandatory attorney fault provision.

Accordingly, we will reverse the judgment and remand the matter with instructions. As to the lender and the trustee, the trial court shall enter an order vacating both the order dismissing the action and the order denying Plaintiffs' ex parte application to vacate the dismissal. As to the purchaser, the court shall reverse the order denying

Plaintiffs' ex parte application to vacate the dismissal, allow further briefing and a hearing on the application, and determine whether, based on a complete record, Plaintiffs are entitled to have the dismissal set aside as to the purchaser.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2016, two named plaintiffs—"ROBERT W. MAHER, an Individual, Successor in Interest to R.L.T.D. LLC, a California Limited Liability Company and ROBERT SNEED"—filed a complaint against Milestone Financial LLC (Lender), Mortgage Lender Services, Inc. (Trustee) and DLI Properties, LLC (Purchaser) (Lender, Trustee, and Purchaser together previously identified as "Defendants") related to a July 2013 loan from Lender to R.L.T.D., LLC, secured by a July 2013 deed of trust on real property in Colton (Property). Because this appeal will be resolved on procedural grounds that arose after the filing of the action, the underlying facts related to the loan transaction and foreclosure are not relevant.

A. *Dismissal of the Action as to Purchaser*

Purchaser demurred to the only two causes of action alleged against it in both the complaint and the first amended complaint. Three named plaintiffs—"ROBERT W. MAHER, as Representative of R.L.T.D. LLC, a California Limited Liability Company; R.L.T.D. LLC; [and] ROBERT SNEED" (previously identified as "Plaintiffs")—filed a second amended complaint against all Defendants, again naming Purchaser only in the same two causes of action.

Purchaser again demurred, and on September 19, 2016, the trial court again sustained Purchaser's demurrer with 30 days leave to amend. Plaintiffs failed to amend,

and more than three months later in January 2017, Purchaser filed an ex parte application to enter a judgment of dismissal of the action as to Purchaser. Although the record on appeal does not contain a copy of the order from the January 11, 2017 hearing on Purchaser's ex parte application, in later proceedings Plaintiffs' counsel testified that the court continued the ex parte hearing until January 18, 2017, and allowed Plaintiffs to file a third amended complaint by that date.

Plaintiffs served their third amended complaint prior to January 18, 2017, but did not file it by the deadline. On that date, the court's unsigned minutes noted that Plaintiffs had not filed a third amended complaint, granted Purchaser's ex parte application, and dismissed with prejudice *the entire action* pursuant to section 581, subdivision (f)(2) (Dismissal Order).¹

B. *Dismissal of the Action as to Lender and Trustee*

While Purchaser's demurrer to the original complaint was pending, Lender and Trustee moved to compel binding arbitration and stay the judicial proceedings. Following briefing and hearing, in May 2016 the court granted the motion as to Lender and denied the motion as to Trustee.²

¹ "The court may dismiss the complaint as to that defendant when: [¶] . . . [¶] . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." (§ 581, subd. (f)(2).)

² The record on appeal does not contain a copy of the court's order, only counsel's notice of ruling.

Although neither Lender nor Trustee was a party to *any* of the proceedings associated with Purchaser's three demurrers, and although Purchaser's January 2017 ex parte application sought a dismissal of the action as to Purchaser only, by its Dismissal Order, the trial court also dismissed the action with prejudice as to Lender and Trustee.

C. *Denial of Relief from Dismissal Order*

In March 2017, Plaintiffs filed an ex parte application to vacate the Dismissal Order pursuant to section 473(b).³ Plaintiffs sought both discretionary relief based on their "mistake, inadvertence, surprise, or excusable neglect" and mandatory relief based on Plaintiffs' counsel's "sworn affidavit attesting to his . . . mistake, inadvertence, surprise, or neglect." (§ 473(b).)

Plaintiffs' counsel's declaration in support of the application included the following evidence: At the time of the January 18, 2017 deadline for filing the third amended complaint, counsel had been living temporarily in New York for health reasons; counsel prepared and served the third amended complaint five days prior to the deadline; counsel instructed his assistant to file the third amended complaint either that same day or the next day; counsel's assistant failed to file the complaint as instructed; by the time she attempted to file it, the Dismissal Order had been entered; the clerk rejected the third

³ In the alternative, Plaintiffs asked that the ex parte application be heard as a motion on shortened time.

amended complaint; and counsel failed to follow up with his assistant or even check the docket until late February 2017.⁴

Counsel concluded his testimony by citing section 473(b) and taking full responsibility for the failure to have filed the third amended complaint by the deadline: "This was my fault that caused the case to be dismissed and Plaintiffs had no involvement in my errors. Based on the facts stated above, on behalf of Plaintiffs, I request that the Court vacate the dismissal based on my mistake[.]"

Without hearing, in an unsigned minute order, the trial court denied Plaintiffs' ex parte application to vacate the Dismissal Order (Section 473(b) Order).

D. *Appeal*

In May 2017, Plaintiffs filed a notice of appeal from the Dismissal Order. In response to our determination that the Dismissal Order was not appealable,⁵ Plaintiffs ultimately obtained, served, and filed with this court an August 2017 judgment of dismissal from the superior court (Judgment). The Judgment is consistent with the Dismissal Order and provides: "The entire action is hereby dismissed with prejudice pursuant to [Code of Civil Procedure section 581, subdivision (f)(2)]."

⁴ Plaintiffs' opening brief on appeal also contains other purported facts regarding "everyone's understanding" of the effect of the service of the third amended complaint and counsel's assistant's difficulties in attempting to file the third amended complaint, but we have disregarded all such factual assertions that lack a record reference and are not contained in counsel's declaration. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276, 281, fn. 5.)

⁵ An unsigned minute order, like the Dismissal Order here, is not appealable. (§ 581d; *Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 369.)

By prior order, we deemed Plaintiffs' premature May 2017 notice of appeal to be taken from the August 2017 Judgment and filed immediately following entry of the Judgment. We thus have jurisdiction to review both the Dismissal Order and the Section 473(b) Order, as well as all other pre-Judgment rulings. (§ 906; *Bakewell v. Bakewell* (1942) 21 Cal.2d 224, 227 ["On appeal from the final judgment the rulings and decision of the court on all the issues are reviewable."].)

II. DISCUSSION

On appeal, Plaintiffs argue that the trial court erred not only in entering the Dismissal Order and the Section 473(b) Order, but also in ordering the dispute with Lender to arbitration and in sustaining Purchaser's demurrer to the second amended complaint. As we explain, we will reverse the Judgment on the following grounds: Lender and Trustee were not parties to any of the proceedings that resulted in the Dismissal Order; and on the limited record presented, Plaintiffs' counsel's uncontradicted declaration of fault satisfied section 473(b)'s requirements for mandatory relief to vacate the Dismissal Order as to Purchaser. We do not reach, and thus express no opinion on, the other issues Plaintiff raises on appeal.

A. *As to Lender and Trustee, the Court Erred in Dismissing the Action*

The trial court filed its section 581, subdivision (f)(2) Dismissal Order "upon the application of [Purchaser]." Significantly, Purchaser's application requested dismissal of the action *only as to Purchaser* based on Plaintiffs' failure to have timely filed an amended complaint following a demurrer brought *only by Purchaser*, DLI Properties, LLC:

"Defendant, DLI Properties, LLC ('DLI' or 'Defendant') applies to the Court to enter an order for *judgment for DLI* and to *dismiss the action as to the DLI* [*sic*] based on Plaintiffs['] . . . failure to timely amend their second amended complaint after a demurrer was sustained on September 19, 2016[,], giving them thirty (30) days leave to amend and notice of the ruling was served on September 19, 2016. [¶] . . . [¶]

"Plaintiffs failed to timely amend and there is no pending complaint *against Defendant, DLI*. Since the time to amend expired long ago, CRC 3.1320(h) provides for the Court to enter *judgment for Defendant, DLI*, pursuant to an ex parte application. [¶] *Defendant* hereby requests that the Court enter judgment *in their* [*sic*] *favor* on the S[econd] A[mended] C[omplaint] by Plaintiffs. In the alternative, Defendant requests that the Court dismiss the action and S[econd] A[mended] C[omplaint] *as to Defendant* with prejudice." (Italics added.)

Given the foregoing application for relief *solely on behalf of Purchaser*, on three independent but related bases—statutory authority, jurisdiction, and due process—the trial court erred in dismissing the action against Lender and Trustee.

First, section 581, subdivision (f)(2)—i.e., the stated basis on which the court dismissed the "[e]ntire action"—only allows for a dismissal following the plaintiff's failure to timely amend following the sustaining of a defendant's demurrer *as to "that defendant."* (§ 581, subd. (f)(2), italics added; see fn. 1, *ante*.) Here, the court applied the statute to two defendants that had not demurred.

Second, where the "requisite notice [to dismiss an action] has not been given to the plaintiff," "the trial court lacks jurisdiction to make the order [of dismissal]." (*Harris v. Board of Ed. of City and County of San Francisco* (1957) 152 Cal.App.2d 677, 680 (*Harris*) [where no formal notice of request to dismiss action is given, affidavits that contained requests for dismissal are insufficient].) Here, because the notice of the

requested action *by Purchaser* sought a dismissal of the action *only as to Purchaser*, the trial court lacked jurisdiction to dismiss the action *as to Lender and Trustee*. (*Ibid.*)

Finally, "[t]he constitutional guarantee of due process requires that a court give notice to a party and an opportunity to respond before sua sponte dismissing an action." (*In re Marriage of Straczynski* (2010) 189 Cal.App.4th 531, 538 (*Straczynski*) [superior court violated wife's due process rights by sua sponte dismissing the dissolution proceeding after denying husband's motion for dismissal based on different grounds].) That is because " 'a cardinal principle of our jurisprudence [is] that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions. [¶] . . . [¶] An order or judgment without such an opportunity is lacking in all the attributes of a judicial determination.' " (*Bricker v. Superior Court* (2005) 133 Cal.App.4th 634, 638 [superior court violated plaintiff's due process rights by sua sponte dismissing action during a readiness conference without notice or an order to show cause].) Here, because the trial court dismissed the action *as to Lender and Trustee* without notice or a hearing, Plaintiffs suffered a due process violation.

Thus, the trial court erred in dismissing the action *as to Lender and Trustee*. The court relied on inapplicable statutory authority (§ 581, subd. (f)(2)), lacked jurisdiction to

effect the dismissal (*Harris, supra*, 152 Cal.App.2d at p. 680), and violated Plaintiffs' due process rights in doing so (*Straczynski, supra*, 189 Cal.App.4th at pp. 538-539).⁶

B. *As to Purchaser, the Court Erred in Denying Plaintiffs' Ex Parte Application for Mandatory Relief Under Section 473(b)*⁷

Section 473(b) allows a trial court to vacate a dismissal on two separate grounds:

(1) The court may—i.e., has the discretion to—relieve a party of a dismissal taken against it as a result of its mistake, inadvertence, surprise, or excusable neglect; and (2) the court must—i.e., is obligated to—relieve a party of a dismissal taken against it where it presents a sworn declaration from its counsel attesting that the dismissal was taken as a result of counsel's mistake, inadvertence, surprise, or neglect.⁸ (*Minick v. City of*

⁶ Because the trial court erred in dismissing the action as to Lender and Trustee, the section 473(b) proceedings to vacate the dismissal as to Lender and Trustee are necessarily moot and will not be discussed further. Likewise, because the trial court erred in dismissing the action as to Lender, there is no final judgment as to Lender; and since there is no final judgment as to Lender, we lack jurisdiction to review the trial court's order granting Lender's motion to compel arbitration. (*Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 94; see § 1294.2.) Accordingly, we express no opinion on the parties' arguments regarding the enforceability of the underlying promissory note, deed of trust, and a settlement agreement between Plaintiffs and Lender that preceded the foreclosure proceedings, as well as the effect of Maher's bankruptcy on the foreclosure proceedings.

⁷ We grant Plaintiffs' request for judicial notice filed December 24, 2018. (Evid. Code, §§ 451, subd. (a), 459, subd. (a)(2).)

⁸ "The court *may*, upon any terms as may be just, relieve a party or his or her legal representative from a . . . dismissal . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . Notwithstanding any other requirements of this section, the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . resulting . . . dismissal entered against his or her client, unless the

Petaluma (2016) 3 Cal.App.5th 15, 25 ["The statute includes a discretionary provision, which applies permissively, and a mandatory provision, which applies as of right."].) Plaintiffs' ex parte application sought relief from the Dismissal Order under both the discretionary and the mandatory provisions of section 473(b). Because Plaintiffs raise no argument on appeal regarding the trial court's exercise of discretion under section 473(b),⁹ we express no opinion on the trial court's denial of relief under the discretionary provision and turn to the issues associated with the application of mandatory relief under section 473(b).

The purposes of the mandatory relief provision of section 473(b) are generally "to promote the determination of actions on their merits" and specifically "to 'relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.' " (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839; accord, *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 [goal is " 'to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys"].) Accordingly, the

court finds that the . . . dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473(b), italics added.)

⁹ Plaintiffs mention section 473(b) discretionary review in point headings in both of their briefs and in one sentence in their reply brief. We deem any such argument forfeited by Plaintiffs' "fail[ure] to make a coherent argument or cite any authority to support their contention." (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007; accord, (Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in an appellate brief must be supported "by argument and, if possible, by citation of authority"].)

court is not concerned with the reasons for the error, only with who is responsible for causing the error. (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438 (*Martin Potts*) ["what must be attested to is the mistake, inadvertence, surprise, or neglect—not the reasons for it"].)

Whether section 473(b)'s requirements have been satisfied "is a question we review for substantial evidence where the evidence is disputed and de novo where it is undisputed." (*Martin Potts, supra*, 244 Cal.App.4th at p. 437; *SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516 [undisputed facts].) Here, because the trial court denied Plaintiffs' section 473(b) ex parte application without waiting for a response or opposition, the evidence in support of the application—i.e., Plaintiffs' counsel's declaration with attachments—is necessarily undisputed. We thus review the Section 473(b) Order de novo.

The uncontradicted evidence in Plaintiffs' counsel's declaration establishes that counsel accepted full responsibility for—and, further, that Plaintiffs had no involvement in—failing to have filed the third amended complaint by the deadline. After describing the events surrounding the attempt(s) to file the complaint and the resulting dismissal of the action, counsel testified: "*This was my fault* that caused the case to be dismissed and *Plaintiffs had no involvement in my errors*. Based on the facts stated above, on behalf of Plaintiffs, I request that the Court vacate the dismissal based on my mistake[.]" (Italics added.)

Under section 473(b) "[r]elief is mandatory when a complying affidavit is filed, even if the attorney's neglect was inexcusable." (*Abers v. Rohrs* (2013) 217

Cal.App.4th 1199, 1210; accord, *Pagnini v. Union Bank, N.A.* (2018) 28 Cal.App.5th 298, 302-303 [" '[I]f the prerequisites for the application of the mandatory provision of [Section 473(b)] exist, the trial court does not have discretion to refuse relief.' "]; *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147 (*Younessi*) [" 'Relief under this provision is mandatory if the conditions are fulfilled.' "].) Stated differently, where, as here, a procedurally and substantively proper attorney declaration of fault is submitted in support of a section 473(b) motion, the trial court may deny mandatory relief *only* where substantial evidence supports a finding that "the . . . dismissal 'was *not* in fact caused by the attorney's mistake, inadvertence, surprise or neglect.' " (Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (The Rutter Group 2018) ¶ 5:292, p. 5-77.) This includes, but is not limited to, situations in which "[the] attorney is attempting to 'cover up' for [the] client" (*ibid.*); "[the attorney's] declaration of fault was not credible" (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915); or the client suggests or authorizes counsel's actions (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1011).

In the present case, at the time the court denied Plaintiffs' ex parte application for section 473(b) relief, there was no opposition, there had been no hearing, and the only evidence in the record was counsel's testimony that the failure to have timely filed the amended complaint was entirely his fault with no involvement by Plaintiffs. On this

record—with no contrary findings by the trial court¹⁰—we will not presume that the court impliedly rejected the only evidence before it.¹¹

Relying on *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 619-620 (*Leader*), Purchaser presents only one argument related to the potential application of section 473(b)'s mandatory provision. According to Purchaser, section 473(b) mandatory relief is inapplicable where, as here, the trial court exercises its discretion by dismissing a complaint pursuant to section 581, subdivision (f)(2)—which provides that the court may dismiss a complaint when the trial court sustains a defendant's demurrer with leave to amend and the plaintiff does not timely amend. (See fn. 1, *ante.*) In making this argument, Purchaser misapplies *Leader* by failing to appreciate that *Leader* is both factually distinguishable from, and by express limiting language inapplicable to, the present case.

¹⁰ At least one court has ruled that section 473(b) *requires* express findings if the court denies relief under the statute's mandatory provision, and an aggrieved section 473(b) applicant is entitled to a reversal upon a showing of prejudice by the lack of findings. (*Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 726-727 (*Rodriguez*); but see *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 910 [appellate court considered trial court's express *and implied* findings in affirming denial of mandatory relief].) While we decline to rule that a trial court must always make express findings in any case where section 473(b) mandatory relief is denied, on the present record—i.e., with no opposition or contrary evidence or inferences—Plaintiffs here were prejudiced by the trial court's denial of mandatory relief without findings.

¹¹ We do so on this record despite the general rule: " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

In *Leader*, the trial court dismissed the plaintiffs' action under section 581, subdivision (f)(2), after: the defendants' demurrers were sustained with leave to amend; the plaintiffs failed to file an amended complaint within the time permitted by the trial court; and the court was presented with cross-motions—the plaintiffs' section 473(b) motion for leave to file an untimely amended complaint and, in response, the defendant's section 581, subdivision (f)(2) motion to dismiss the action. (*Leader, supra*, 89 Cal.App.4th at pp. 607, 611.) The appellate court affirmed, concluding, among other things, that the mandatory provision of section 473(b) did not apply to relieve the plaintiffs from their counsel's failure to timely file an amended complaint. (*Leader*, at p. 620.) More specifically, the *Leader* court ruled that the dismissal was not analogous to a default judgment, to which section 473(b) would apply, because the dismissal followed a hearing at which the trial court received and considered the plaintiffs' opposition to the defendants' requested dismissal. (*Leader*, at p. 621.) Indeed, in *Leader* the appellate court expressly limited its holding to cases "where, as here, the dismissal was entered after a hearing on noticed motions which required the court to evaluate the reasons for delay in determining how to exercise its discretion." (*Id.* at p. 620.) *Leader* explained that "the 'day in court' envisioned by [section 473(b) case law] is not a guaranteed trial on the merits, but merely the opportunity to appear and present evidence and argument *in opposition to the motion to dismiss*." (*Leader*, at p. 621.) Because the plaintiffs in *Leader* fully responded to the defendants' motion to dismiss—both in an opposition and in a separate section 473(b) of their own—the plaintiffs in *Leader* were precluded from merely applying the mandatory relief available under section 473(b); rather, based on the

evidence presented in the competing motions, the trial court properly exercised its discretion under the two statutes at issue in dismissing the action and denying the untimely leave to amend. (*Leader*, at p. 621.)

Instead of relying on *Leader*, *supra*, 89 Cal.App.4th 603, we find guidance in *Younessi*, *supra*, 244 Cal.App.4th 1137. Like the present case, in *Younessi*: the trial court granted the defendants' demurrers with leave to amend; the plaintiffs failed to amend timely; one defendant filed an "ex parte application to dismiss the action";¹² the court granted the application and dismissed the action as to all of the defendants; later the same day, the court rejected the plaintiffs' attempt to file the amended complaint on the basis the action had been dismissed; and the plaintiffs sought section 473(b) relief on grounds of both excusable neglect and attorney fault. (*Younessi*, at pp. 1140-1141, 1148.) Although, unlike the present case, the trial court set aside the dismissal and the appellate court affirmed (*id.* at pp. 1140-1141), the court's reasoning is persuasive: Because the attorney's declaration of fault complied with section 473(b)'s requirements, the plaintiffs were entitled to *mandatory* relief under section 473(b).¹³ (*Younessi*, at pp. 1147-1149.)

¹² The opinion does not provide any statutory authority in support of the defendant's application to dismiss the action, instead merely describing the basis of the application as the "plaintiffs[]" fail[ure] to timely file an amended complaint." (*Younessi*, *supra*, 244 Cal.App.4th at p. 1141.)

¹³ The trial court erred in granting *discretionary* relief on the basis of the plaintiffs' counsel's excusable neglect, because the plaintiffs' showing did not include evidence of diligence in bringing the section 473(b) motion—a statutory requirement for obtaining discretionary relief. (*Younessi*, *supra*, 244 Cal.App.4th at pp. 1144-1147 [seven-week delay].)

Thus, although *Leader* holds that section 473(b) mandatory relief cannot be used to set aside a section 581, subdivision (f)(2) dismissal (*Leader, supra*, 89 Cal.App.4th at pp. 619-620), by its own terms *Leader* is limited to situations in which "the dismissal was entered after a hearing on noticed motions which required the court to evaluate the reasons for delay in determining how to exercise its discretion" (*id.* at p. 620).

In contrast, there is no limitation to granting mandatory relief under section 473(b) where—as in *Younessi, supra*, 244 Cal.App.4th 1137, and the present case—"the dismissal resulted from an order granting [an] ex parte application for entry of a dismissal, without any opposition from plaintiffs that would allow the trial court to evaluate why they had failed to timely file an amended complaint." (*Id.* at p. 1148.)

Here, because Plaintiffs presented uncontradicted evidence of counsel's fault and their lack of involvement, they complied with section 473(b)'s provision that requires mandatory relief. Thus, based on our de novo review, the Section 473(b) Order must be reversed as a result of the trial court's error in denying Plaintiffs' ex parte application to vacate the Dismissal Order *on the present record*.¹⁴

However, we cannot say that Plaintiffs are entitled to an order granting their ex parte application to vacate the Dismissal Order as a matter of law, since procedurally the court ruled on the application without allowing Purchaser the opportunity to file an opposition. Accordingly, on remand, the court shall allow Purchaser to respond to

¹⁴ Even under the more deferential substantial evidence standard of review, we would reach the same conclusion, since the record contains *no evidence or inferences from evidence* to support an implied finding that the "dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect" (§ 473(b)).

Plaintiffs' ex parte application (and Plaintiffs to reply, if necessary) and conduct a hearing. The court shall grant Plaintiffs' requested relief and vacate the Dismissal Order as to Purchaser, unless the record contains, and the court relies on, evidence or inferences from evidence that allow the court to reject what is now Plaintiffs' counsel's uncontradicted evidence that supports section 473(b) mandatory relief. If the court grants mandatory relief, then, upon a sufficient showing by Purchaser, the court shall also "direct [Plaintiffs'] attorney to pay reasonable compensatory legal fees and costs" to Purchaser and its counsel, as required by section 473(b). (*Martin Potts, supra*, 244 Cal.App.4th at p. 438; *Rodriguez, supra*, 234 Cal.App.4th at p. 734.) If, however, based on the complete record, the court denies Plaintiffs' ex parte application, then the court shall enter judgment in favor of Purchaser based on the Dismissal Order.

III. DISPOSITION

The Judgment is reversed. The trial court shall enter orders vacating both the Dismissal Order and the Section 473(b) Order as to Lender and Trustee and reversing the Section 473(b) Order as to Purchaser. Consistent with the procedure set forth at the end of part II.B., *ante*, the court shall then conduct further proceedings on Plaintiffs' ex parte application to vacate the Dismissal Order as to Purchaser only.

The parties shall bear their respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IRION, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.